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IN THE
Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,

Petitioners,

v.

JOSEPH SCHEIDLER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF FOCUS ON THE FAMILY AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS JOSEPH SCHEIDLER, *et al.*

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I. INTEREST OF AMICUS CURIAE

This brief supporting the Respondents is filed, with the consent of the parties, on behalf of Focus on the Family. Focus on the Family is a Christian nonprofit corporation committed to promoting Judeo-Christian values through proclamation of the gospel of Jesus Christ and the strengthening of the emotional, psychological and spiritual health of families in the United States and throughout the world. It promotes discussion of issues which relate to its mission through its radio program heard by more than one million people daily over fourteen hundred stations and through its monthly magazines circulated to over two million people.

Focus on the Family is concerned over restrictions on the freedom of speech and assembly and is, therefore, concerned by the attack on such freedoms posed by the position of Petitioners.

This case is of special importance to the *amicus* because a result in favor of the Petitioners would limit a citizen's right to participate in "public-issue picketing" and cause excessive chilling of such activities. The attempt today to limit the First Amendment rights of free speech and assembly against unpopular abortion clinic demonstrators will be used tomorrow to silence other selected political activists.

SUMMARY OF ARGUMENT

The Petitioners' arguments rely on an interpretation of the Racketeering Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, which expands it to cover activities that are not financially motivated either in the enterprise or in the predicate act. This expansion is not supported by the clear language of the statute as held by three of the four circuits that have addressed this issue. The Petitioners' theory of recovery rests solely on a definition of Hobbs Act extortion that is contrary to the plain language of 18 U.S.C. § 1951. Petitioners' position is inconsistent with established case law, is incompatible with the principle of lenity, and is contrary to common law. Petitioners' interpretation wholly disregards the requirement that a defendant "obtain" property in order to commit the crime of extortion. Finally, Petitioners' interpretation of the RICO statute and the Hobbs Act is incompatible with First Amendment rights of free speech and assembly.

I. The Hobbs Act Does Not Apply To Activities In Which Neither The Defendant Nor A Related Third Party "Obtain" Property.

Liability under the Hobbs Act requires that the defendant or a related third party wrongfully "obtain" property from another. In interpreting this statute, the Court must look at the elements of the

traditional common law offense of extortion and the statutory and interpretive case law, all of which provide that "obtaining" property is a required element of this crime.

A. *The Plain Meaning Of The Word "Obtain" In The Hobbs Act Demands The Acquiring Of Property.*

Extortion is defined in 18 U.S.C. § 1951(b)(2) as the "obtaining" of property from another.[1] The fundamental rule of statutory interpretation requires that words be given their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983). The ordinary meaning of "obtain" is "to get a hold of by effort"[2] and "to come into possession or enjoyment of (something) by one's own effort, or by request[.]"[3] The plain meaning of the Hobbs Act does not extend to instances in which neither the defendant nor a related third party acquired something, regardless of whether the plaintiff parted with or gave up something.

Where there is no ambiguity in the words chosen by the legislature, there is no room for construction. *Yates v. United States*, 354 U.S. 298, 305 (1956)(citing *United States v. Wiltberger*, 5 Wheat. 76, 95-96 (1820). Moreover, in interpreting a criminal statute, all language must be strictly construed with any ambiguity resolved in favor of lenity. *United States v. O'Grady*, 742 F.2d 682, 694 (1984)

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[1] Section 1951(b)(2) defines extortion as:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (emphasis added)

[2] Black's Law Dictionary defines "obtain" as: "To get hold of by effort; to get possession of; to procure; to acquire, in any way." BLACK'S LAW DICTIONARY 1078 (6th ed. 1990).

[3] The Oxford English Dictionary defines "obtain" as: "To come into the possession or enjoyment of (something) by one's own effort, or by request; ... hence, generally, to acquire, get." OXFORD ENGLISH DICTIONARY Vol. 10, 669-670 (2nd ed. 1989).

(citing *United States v. Enmons*, 410 U.S. 396, 411 (1973)(citations omitted); *cf. United States v. Chestnut*, 394 F. Supp. 581, 591 (S.D.N.Y. 1975)(narrow construction of criminal statute meets "least drastic means" test), *aff'd*, 533 F.2d 40 (2d Cir.), *cert. denied*, 429 U.S. 829 (1976).

B. *Common Law Extortion Required That The Defendant Obtain Property.*

At common law "extortion" was an acquisitive crime requiring a taking of property to complete the offense. Since 1285, extortion has required such a taking.[4] The requirement that the extortionist "obtain" or "receive" were necessary elements of the crime throughout history.[5]

Although the scope of the common law offense was generally expanded by statute to include wrongful obtaining of property by a private person through a wrongful threat to do injury, it nevertheless continued to require an "obtaining." Comment, Griep, *A Study of Statutory Blackmail and Extortion in the Several States*, 44 Mich. L. Rev. 461 (1945).

C. *The Legislative History Of The Hobbs Act Dictates The Necessity For The Element Of "Obtain."*

Congress enacted the Hobbs Act recapitulating the common law offense of "extortion." All federal statutes that recapitulate traditional offenses are to be read as incorporating the historical elements of those offenses. *Morissette v. United States*, 342 U.S. 246

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[4] Westminster I, 3 Edw. c 26, 27, 28, 30, 31, Westminster II, c 13 Edw. (1285).

[5] 11 Hen. 7, ch. 23 (1494)("**receive** ... by Color of their Office"); 33 Hen. 8, ch. 39 (1541)("**receive** or take")("**receive** and take"); 2 & 3 Edw. 6, ch. 6 (1548)("exact, **receive** or take"); 4 & 5 Phil. & M., ch. 3 (1557)("exact, levy, **receive** or take") 21 Hen. 77, ch. 6 (1529)("take, **receive** or demand"); 23 Hen. 8, ch. 9 (1531)("ask, demand, take or **receive**"); 27 Eliz. ch. 6 (1585)("**receive**, take or have"); 27 Eliz. ch. 6, § 2 (1589)("have, **receive** or take"); 2 Jac., ch. 5 (1604)("take, **receive** or make benefit to his own use")(emphasis added)

(1952);[6] *United States v. Bailey*, 444 U.S. 394 (1980).[7] Accordingly, Hobbs Act extortion, like extortion at common law, is an acquisitive crime that requires a taking.

Congress, in enacting the Hobbs Act, took its relevant language from the New York Field Code.[8] Since Congress enacted the Hobbs Act based on New York law, the settled interpretation of extortion law in New York jurisprudence is as much a part of the Hobbs Act as if Congress itself directly enacted it. *Willis v. Eastern Trust and Banking Co.*, 169 U.S. 295, 307-308 (1887). Accordingly, in interpreting the Hobbs Act, the New York Field Code and cases construing it control.

Under New York law, the question of whether or not an extortion occurred turned on whether or not the defendant intended to receive or procure money. Other motivations did not suffice. In the Commentary to Chapter IV, Section 584 (Larceny), the Field Code Commissioners appropriately observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion and embezzlement. The leading distinctions between these, in the view taken by the commissioners may be briefly stated thus: All four include the criminal acquisition of the property of another.

[6] In *Morissette v. United States*, 342 U.S. 246 (1952), the court held that even when the statute did not state a *mens rea* for the crime, the *mens rea* for larceny was applied because such an element was required under pre-existing common law.

[7] This court noted in *United States v. Bailey*, 444 U.S. 394, 415 n. 11 (1980), "that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law ... and that therefore [common law concepts] may have been contemplated by Congress [when criminal statutes are enacted]." It further held that "the Anglo-Saxon tradition of criminal justice, [is] embodied in the United States Constitution and in federal statutes ...." *Id.* at 414.

[8] 89 Cong. Rec. 3227 (1943)(Statement of Hobbs)("There are two definitions [extortion and robbery] set forth in the bill, both of which are based on the New York law." *See also*, 91 Cong. Rec. 11,906 (1945) (Statements of Hobbs and Robison). The New York Field Code defines extortion as: "Extortion is the obtaining of property from another, with his consent, induced by wrongful use of force or fear, or under color of official right." New York Penal Code § 613, Ch. 6 (1865).

New York Field Code, Ch. 4, § 584 (emphasis added). In *People v. Ryan*, 232 N.Y. 234, 133 N.E. 572, 573 (1921), a prosecution for blackmail, (one element of which was "the intent ... to extort or gain any money or other property") the court held that a threat to injure a business without an accompanying intent to "gain money or property" did not fall within the statute.[9] *See also, People v. Squillante*, 18 Misc.2d 516, 564, 185 N.Y.S.2d 357, 361 (1959)(In an extortion prosecution the court held that "'obtaining of property from another' imports not only that he give up something but that the obtainer receive something").

The Hobbs Act and case law indicates no intent to depart from the common law requirement that property be "obtained." Congress' use of the term "obtaining" clearly demonstrates an affirmation of the requirement of gain by the defendant and an intent to punish only criminal activities, which are motivated by profit or gain. The "obtaining" requirement can only be met if the defendant or a related third party or entity acquires the property of the owner. *United States v. Green*, 350 U.S. 415, 418-420 (1955). Until the unprecedented decision in *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3rd Cir. 1989), *cert. denied*, 493 U.S. 901 (1989), no court had held that extortion occurs when neither the defendant nor a related third party receives a benefit.[10]

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[9] In discussing the elements of the crime, the Court noted: "If it were simply the foolish act of an elderly woman, moved by anger, spite or revenge, without any intent to procure or extort money, there would be no crime of blackmail." *People v. Ryan*, 133 N.E. 572, 573 (1921).

[10] The three cases cited by the lower court, in footnote 17, do not support the court's contention that the Hobbs Act does not require an economic motive. In *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101-192 (2nd Cir. 1990), the court in *dicta* quotes *United States v. Clemente*, 640 F.2d 1069, 1079-80 (2nd Cir. 1981), in which there was an obtaining, not by the defendant himself, but by related third parties -- hardly the situation in the instant case. In *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983), the obtaining element was not squarely raised. In *United States v. Starks*, 515 F.2d 112 (3rd Cir. 1975), the religious organization in fact "obtained" property, and the court held, not surprisingly, that the mere fact that the defendant was obtaining funds on behalf of a religious organization did not insulate him from liability under the Hobbs Act.

This Court has previously refused to apply the Hobbs Act even to violent activities occurring during a labor strike for higher wages, because such activity does not squarely meet the requirements of the Hobbs Act. *United States v. Enmons*, 410 U.S. 396, 411 (1973).

It is undeniable that Congress intended to limit the application of this criminal statute only to those who wrongfully seek to gain property from another. The actions of the respondents simply do not meet that criterion.

The Respondents in this action were not business competitors of the clinic or its employees. They stood to gain nothing by the diminution of the clinic's business, nor do the Petitioners even allege that any related third party benefited because of the actions of the Respondents. As such, the crime of "extortion" is not relevant to their conduct. Whatever else they might have been — no matter how much one may agree or disagree with their actions — they are not extortionists.

II. Liability Under RICO Can Only Be Imposed When A RICO Enterprise Or Its Predicate Act Is Economically Motivated.

RICO was enacted to "seek the eradication of organized crime in the United States by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[11] Obviously the government has an interest and a right to restrain felons. Congress fully intended RICO to reach traditional organized crime. Although RICO has incidentally stretched beyond organized crime, such an incidental use was limited by the requirement of economic motivation.[12] This Court has refused to expand the Hobbs Act to

[11] *See*, Senate Comm. of the Judiciary, Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Conf., 1st Sess (1969).

[12] Congress had to define organized crime indirectly: functionally by what people did, not by who they were. The functional definition brought in, secondarily, people who were not members of organized crime but who engaged in activities characteristic of organized crime. *See*, A.B.A. Section of Corp. Banking & Business Law, Report of the Ad Hoc civil RICO Task Force 88 (1985) at 90.

political demonstrations or picketing operations or make violators of minor state offenses[13] subject to federal felony charges. *United States v. Enmons*, 410 U.S. 396, 411 (1973). Certainly this Court should not now penalize political activity under RICO.

In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that RICO applied to any organization, legitimate or not, whose activities generate monies, so as to serve as a "spring board into the sphere of legitimate enterprise." *Id.* at 591. Either the predicate acts or the enterprise, however, must have some financial motive. Three of the four circuits that have addressed this issue agree. *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985); *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983); *see also, United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988); *United States v. Darryl Freeman, Tyrone Netters*, Nos. 92-10094, 92-10102 (9th Cir. Sept. 22, 1993)(LEXIS, 1993 U. S. App. 24255); *cf. Northeast Women's Center v. McMonagle*, 868 F.2d 1342, 1349-50 (3d Cir.) *cert. denied*, 493 U.S. 901 (1989).

The Second Circuit specifically discussed the term "enterprise" in *Ivic*, and concluded that the term "enterprise" in subsections (a) and (b) of 18 U.S.C. § 1962 clearly refers to the sort of entity that one joins to make money. *Ivic* at 65.[14] The Second Circuit's analysis adhered to the rule that when the same word is used in the same section of an act more than once, and the meaning is clear in one place, it will

[13] Charges such as those discussed in Petitioners' brief, i.e. trespass, blocking, disorderly conduct charges in *Enmons* were significantly more serious.

[14] (a) It shall be unlawful for any person who has **received any income** derived, directly or indirectly, from a pattern of racketeering activity, or through collection of an unlawful debt in which such person has participated as a principle within the meaning of section 2, title 18, United States Code, **to use or invest, directly or indirectly, any part of such income, or the proceeds of such income**, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.... 18 U.S.C. § 1962(a)(relevant portion)

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. 18 U.S.C. § 1962(b)

be assumed to have the same meaning in the other place. *Id.* Under subsection (a) a person can only be liable if he or she has "**received** any income derived, directly or indirectly from a pattern of racketeering activity, or through a collection of an unlawful debt ..." 18 U.S.C. § 1962(a)(relevant portion). Thus, as with the Hobbs Act, RICO requires that a defendant **receive ("obtain")** something of a financial benefit.

Similarly, under subsection (b) only a person who **acquires** an interest in an enterprise through a pattern of racketeering can be held liable. Again, like the Hobbs Act, RICO requires that a person **acquire ("obtain")** something if liability is to be imposed. 18 U.S.C. § 1962(b). Under either of these sections no liability can be imposed without the Court first finding an economic benefit to the defendant. Accordingly, it must be inferred that where an economic motivation is required under subsections (a) and (b) economic motivation must be required under (c) and (d) as well. That is particularly true since all subsections are set forth within the same section of the statute, 18 U.S.C. § 1962, and all utilize the term: "enterprise". There is no indication that Congress intended the term "enterprise" to mean something different in subsection (c). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1984), this Court stated that "we should not lightly infer that Congress intended [terms] to have wholly different meanings in neighboring subsections." *Id.* at 489.

For this Court to interpret subsection (c) differently from subsections (a) and (b) and not require an economic motivating factor would expand the statute beyond that intended by the legislature.[15]

Most recently in *United States v. Darryl Freeman, Tyrone Netters*, Nos. 92-10094, 92-10102 (9th Cir. Sept. 22, 1993)(LEXIS, 1993 U. S. App. 24255), the 9th Circuit Court of Appeals held that either an economic motive in the enterprise or in the predicate act was sufficient to uphold a conviction under RICO.[16]

[15] *See, Yates v. United States*, 354 U.S. 198 (1956) and argument, *supra*.

[16] The defendant Netters argued that neither the enterprise (49th Assembly District) nor the predicate act (bribery crimes) were economically motivated. However,

Implicit in the decision is the notion that economic motivation in either the enterprise or the predicate act is *sine qua non* for RICO liability. Without one or the other, there can be no liability. Further as held in *Ivic, supra, Flynn, supra, Ferguson, supra,* and *Netters, supra,* it is only critical that either the enterprise or the predicate act be economically motivated. Thus the enterprise itself need not be economically motivated as long as the predicate acts are economically motivated. This requirement is even more apparent when the predicate act is an acquisitive crime, i.e. bribery or extortion.

If the Hobbs Act is properly interpreted as an acquisitive crime, it is unquestionably economically motivated. However, even if Hobbs is interpreted as the Petitioners request, and ruled no longer an acquisitive crime, economic motivation must still be found in the enterprise itself.

III. Application Of The Hobbs Act And RICO To Non-Economically Motivated Political Activity Is Incompatible With The First Amendment.

Even though Petitioners allege violent conduct, which is clearly not protected by the First Amendment, the Court should not impose liability under the RICO Act since its scope is not limited to actions that are necessarily violent. If this Court declines to find the statutory necessity for an economic motivation, it will create widespread abuse of RICO claims against First Amendment protesters.

RICO has become the "weapon of choice" for private litigators to chill First Amendment rights.[17] The potential effect of applying

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the court held that although the enterprise may not have been economically motivated, it was clear that the state law bribery crimes were economically motivated. *United States v. Darryl Freeman, Tyrone Netters,* Nos. 92-10094, 91-10102 (9th Cir. Sept. 22, 1993)(LEXIS, [*34-35] 1993 U.S. App. 24255).

[17] "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit ....[C]ivil RICO has been used for extorsive purposes, giving rise to the very evils that it was designed to combat." Califa, *RICO Threatens Civil Liberties,* 43 Vand. L. Rev. 805, 834 (1990).

RICO to political activities with no economic motivation is enormous. "Public-issue picketing" occupies the highest rung in the hierarchy of values protected by the First Amendment. *Carey v. Brown*, 447 U.S. 455, 467 (1980). It is to protect this all-important value in our culture that courts have developed the doctrine of the "chilling effect." This doctrine reflects our preference for errors made in favor of free speech.[18]

A. *First Amendment Rights Allow Great Freedom And Must Not Be Chilled.*

A function of speech is to invite dispute and confrontation. It may serve its highest purpose when it induces a condition of unrest, or creates a situation of unrest, or even when it "stirs people to anger." *Cox v. Louisiana*, 379 U.S. 536, 551-552 (1965).

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech ... is ... protected against censorship or punishment .... There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Id. at 522 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949). Justice Brennan referred to these freedoms as "delicate and vulnerable." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

This Court has previously exercised extreme caution in imposing criminal sanctions for activities occurring within the range of legitimate political protest:

> In *Scales*, the Court held that protection for the innocent could be adequately accomplished by requiring that the defendants' specific illegal intent be proved to the degree demanded in *Noto v. United States*, 1961, 367 U.S. 290, 81

[18] Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U.L. Rev. 685 (1978).

> S.Ct. 1517, 6 L.Ed.2d 836. "[C]riminal intent ... must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. United States*, at 299-300, 891 S.Ct. at 1522. [footnote omitted] When the alleged agreement is both bifarious and political within the shadow of the First Amendment, we hold that an individuals specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated." *Scales v. United States*, 367 U.S. at 234, 81 S. Ct. at 1488.

United States v. Spock, 416 F.2d 165, 172-173 (1st Cir. 1969).

In interpreting and applying statutes to First Amendment activities, such statutes can be applied only if they can be "narrowly tailored" to avoid infringement on First Amendment rights. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The court in *Claiborne* reversed the lower court's judgment against defendants, setting forth the constitutional standards:

> The First Amendment does not protect violence .... No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, **however, 'precision of regulation' is demanded.** *NAACP v. Button*, 371 U.S. 415, 438. **Specifically, the presence of activity protected by First Amendment imposes restraints on the grounds that may give rise to damage liability and to the persons who may be held accountable for those damages."**

Claiborne, 458 U.S. at 916-917 (emphasis added). Thus, boycotts, picketing, demonstrations and other forms of free speech, petition, assembly and association may be coercive and intimidating without losing First Amendment protection. The fact that the object of the protest sustains a loss or deprivation does not entitle it to deny First Amendment protection for such protest. *NAACP v. Claiborne, supra.*

B. *This Court Must Construe RICO And The Hobbs Act In A Manner Providing First Amendment Protection.*

It is a fundamental principle of statutory interpretation that statutes be construed in order to avoid punishing activities that are protected by the First Amendment. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1971). This Court not only has a duty to look at this challenge to the statute's application, but has a duty to look at the statute's overall application.[19]

Under the Petitioners' application of RICO to an expanded definition of Hobbs Act extortion, all manner of political protest which results in economic loss to the object of the protest is subject to the threat of criminal prosecution and/or the extraordinary civil penalties imposed under RICO. If this Court dispenses with the requirement that the defendant "obtain" property, it will have fashioned a formula whereby any illegal or unprotected activity, regardless of how minor, is extortionate, due to the fact that it occurred in the context of a protest which was, almost as a matter of definition, coercive, intimidating or fear-provoking. *Cox v. Louisiana*, *supra*. While Petitioners imply that RICO liability, based on asserted predicate acts of extortion, will be limited to certain undefined "violent"

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[19] In *Bigelow v. Virginia*, 421 U.S. 809, 815-816 (1975), the court in a claim by Bigelow that his First Amendment rights were violated held that even though Bigelow may not have had his own activity shown to be constitutionally privileged, nevertheless the court would not hesitate "to take into account possible application of the statute in other factual contexts besides that at bar." *Id.* at 816. *See also, NAACP v. Button*, 371 U.S. 415 1963); *United States v. Stansell*, 847 F.2d 609 (9th Cir. 1988).

acts, they cite no statutory basis for such limitation, because, o course, no such limitation exists.[20]

Such an interpretation would have a profoundly chilling impact on all manner of political protest and particularly on any act o civil disobedience.

The *amici* brief of the NOW Legal Defense and Education Fund and others, notes that "traditional" forms of civil disobedienc include such minor criminal conduct as trespass, disorderly conduct and blocking traffic. Such actions, of course, are not constitutionally protected. Yet, under Petitioners' interpretation, any of these actions (blocking, trespass, disorderly conduct) particularly when engaged in by dozens or hundreds of participants would often induce "fear," and would therefore be susceptible to a criminal charge or civil claim of Hobbs Act extortion.

Undoubtedly, under this expanded definition of "extortion" those expressing unpopular political opinions will be the hardest hit by prosecutors and plaintiffs alike, who, as the *amici* suggest, will attempt to distinguish politically correct civil disobedience (civil rights, suffrage, gay/lesbian rights) from politically incorrect civil disobedience (pro-life among others) on the basis of an undefined and factually unsupported "violence" criterion which is nowhere to be found either in the Hobbs Act or in the RICO statute.

If the Court dispenses with the "obtaining of property" requirement, whether or not a protester extorts by engaging in "wrongful use of actual or threatened force, violence or fear" becomes a

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[20] The RICO statute can and has been used against pro-life protesters who engage in peaceful civil disobedience, on the basis of an extortion theory. In *Feminist Women's Health Center v. Roberts, et al.*, W. D. Wa. 86-161-Z (1990)(*petition for review pending* 9th Cir. Nos. 90-35266 and 90-35298)(1993), one of the defendants, Sharon Codispoti, faced an extortion claim after she and one other person sat on the steps of a clinic occupied by several businesses, including the clinic, without impeding anyone. No violence, force, injury, or threat of injury by Codispoti was claimed. "Conspiracy" was apparently inferred because she attended a meeting regarding the protest.

factual question for a jury. Does anyone doubt that an Alabama jury would have found that the actions of Dr. King and others in engaging in sit-ins on private property constituted "use of ... fear" against business owners and white customers resulting in losses to the targeted businesses? Consider, for example, the holding of the state court, largely based on a finding of "atmosphere of fear," which this court reversed in *NAACP v. Claiborne*. Surely many civil rights protesters would have declined to engage in sit-ins had they been faced with criminal and civil claims of racketeering!

The threat to First Amendment protection is exacerbated by the fact that political speech often occurs in concert with others. Indeed, Freedom of Assembly is explicitly protected by the First Amendment. Since some elements of intimidation or fear are arguably present whenever numerous individuals choose to protest together, by the Petitioners' formulation, extortion can be asserted, under vicarious liability theories of conspiracy or aiding and abetting, if any illegal or unprotected activity occurs during such a demonstration. If the existence of a conspiracy may be inferred from the facts,[21] as is often the case, such facts can only be determined by a jury or trier of fact; therefore, a wholly innocent picketer, sued or criminally charged as a RICO co-conspirator, may find it impossible to secure a dismissal short of trial.

Shockingly, under Petitioners' proposed interpretation of RICO and the Hobbs Act, political protesters who engage in otherwise minor illegal conduct will be dealt with much more harshly, as extortionists and racketeers, than defendants who engage in the same conduct (i.e., trespass, disorderly conduct and destruction of property) for non-political reasons, or for no reason. The political protester's punishment is enhanced because he/she is motivated by a desire to bring about a change in the practices of another. Such a result constitutes a "deprivation" sufficient to support an extortion claim under Petitioners' expansive definition of the meaning of Hobbs Act

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[21] *Iannelli v. United States*, 420 U.S. 770, 777, n. 10 (1975).

"obtaining". Thus, any illegal activity, however minor, is automatically extortionate and thus felonious, because it occurs in the context of political persuasion. Such an interpretation of criminal statutes is completely antithetical to the fundamental constitutional principle which holds that illegal activity, in the context of political speech must be subjected to the "strictest law". *NAACP v. Claiborne Hardware*, 458 U.S. 886, 919, 102 S.Ct. 3409, 3429 (1982)(citing *Noto v. United States*, 367 U.S. 290, 299 (1960).

Without a doubt, political protesters will be dissuaded from expressing their views on abortion or any other issue, so long as they face the specter of severe criminal and/or civil liability under the Hobbs Act or RICO. Such an application of the RICO statute is wholly improper and unconstitutional.

CONCLUSION

We urge that this court rule (1) that the Hobbs Act requires the element of "obtaining" and be affirmed as an acquisitive crime and, (2) and in any event, that either the enterprise or the predicate act under RICO require economic motivation. We urge this Court to frame its ruling carefully so as to prevent any abusive use of RICO claims to chill nonviolent exercise of First Amendment rights.

Respectfully submitted,

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